In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-392

SUSANNE ORRIN, PETITIONER

v.

WILLIAM E. SIMON, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner brought this action in the United States District Court for the District of Columbia, seeking, *inter alia*, a declaratory judgment that Section 5(b) of the Trading with the Enemy Act, 50 U.S.C. App. 5(b), and the Foreign Assets Control Regulations, 31 C.F.R. Part 500, are unconstitutional as applied to the noncommercial importation of printed matter. The suit arose out of the seizure by Customs officials, pursuant to a lawful border search upon petitioner's re-entry into the United States from Canada, of three paperback books that apparently had been printed in North Vietnam and for which petitioner had no Treasury Department importation license. (R.A. 27A-28A, 32A-33A).[1]

[1] "R.A." refers to the record appendix in the Court of Appeals.

The district court sustained the constitutionality of the challenged Act and regulations (Pet. App. 3a-25a), and the court of appeals affirmed (Pet. App. 1a-2a).

Section 5(b) of the Trading with the Enemy Act, 50 U.S.C. App. 5(b), authorizes the President during a period of war or national emergency to control the flow of American currency to foreign nations. Acting under the authority of that Act[2], the Secretary of the Treasury, to whom the President has delegated rule-making power under the Act, promulgated the Foreign Assets Control Regulations, 31 C.F.R. Part 500. Those regulations, which are intended to limit the flow of United States currency to certain specified nations, including North Vietnam, impose licensing requirements for the importation from those nations of numerous products, including publications. 31 C.F.R. 500.204. In 1969, when United States forces were engaged in military action in Vietnam, petitioner, without applying for an importation license, attempted to bring into the United States three paperback books published and printed in North Vietnam.

1. Petitioner first contends (Pet. 5-13) that the Act and its implementing regulations impose an unconstitutional restraint upon free speech and publication. But as the court of appeals here, and the Second and Third Circuits, have properly concluded, the restraints imposed on the importation of publications are permissible "as incidental to the proper, important, and substantial general purpose of the regulations."

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[2]At all times pertinent, a declared state of national emergency was in effect. Proclamation No. 2914, 64 Stat. A454; Executive Order 10896, 25 Fed. Reg. 12281; Executive Order 10905, 26 Fed. Reg. 321; Executive Order 11037, 26 Fed. Reg. 6967.

Teague v. *Regional Commissioner of Customs, Region II*, 404 F. 2d 441, 446 (C.A. 2), certiorari denied, 394 U.S. 977; *Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs, Region II*, 459 F. 2d 676 (C.A. 3), certiorari denied, 409 U.S.933.

a. Contrary to petitioner's contention (Pet. 8-11), the licensing procedure is neither unreasonable nor burdensome, nor does it involve undue delay. As the Third Circuit pointed out in *Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs, Region II, supra*, 459 F. 2d at 682, the license application form itself is short, and little time or effort is required for filling it out. Applications normally are processed within ten days. See *Teague* v. *Regional Commissioner of Customs, Region II, supra*, 404 F. 2d at 446.[3]

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[3]Petitioner challenges the accuracy of this statement (Pet. 9), pointing to the language in *Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs, Region II, supra*, 459 F. 2d at 682, that "the Notice of Detention contemplates 45 days, which may be extended to a maximum of ninety days." The Notice of Detention, however, is a Customs form notifying importers that merchandise subject to license requirements will not be held in custody for longer than the period indicated; it has no bearing on the time required for processing license applications.

The lengthy processing period complained of in *American Documentary Films, Inc.* v. *Secretary of the Treasury*, 344 F. Supp. 703 (S.D. N.Y.), resulted from the applicant's refusal to respond to a list of material questions propounded by the Treasury Department. The denial of a license to the plaintiff in that case was accompanied by notice that the application would be reconsidered if and when answers were furnished to such questions. The court in *American Documentary Films* noted (344 F. Supp. at 706-707) that the importation of certain Cuban posters was authorized "promptly" when similar questions were answered.

A brief period of delay is reasonable to implement the purpose of the statute and regulations—to insure that no economic benefits accrue to the country in which the publications originated, absent some overriding benefit to the American public. But the delay does not derive from content discrimination. The regulations explicitly require that the licensing decision be made without regard to the content of the publications sought to be imported. 31 C.F.R. 500.204, App. (108). Thus petitioner's reliance on cases such as *Near* v. *Minnesota*, 283 U.S. 697; *Freedman* v. *Maryland*, 380 U.S. 51; and *New York Times Co.* v. *United States*, 403 U.S. 713, is misplaced.

Nor does this Court's recent decision in *Procunier* v. *Martinez*, 416 U.S. 396, detract from the force of *Teague* and *Veterans and Reservists*. In *Procunier* this Court held (416 U.S. at 408-409) that "the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication." However, the courts of appeals in both *Teague* (404 F. 2d at 445-446) and *Veterans and Reservists* (459 F. 2d at 681-682) explicitly recognized that the respective plaintiffs possessed First Amendment rights even as potential recipients of nonpersonal published materials but concluded that the incidental infringement of such rights entailed by the Trading with the Enemy Act and its implementing regulations was constitutionally acceptable in view of the legitimate interests served by the restrictions on imports. The balance struck in *Procunier* was different merely because the respective weights of the conflicting private and governmental interests were themselves quite different.

b. Petitioner also contends (Pet. 11-12) that the licensing process impermissibly strips the applicant of anonymity. But the purpose of the Act, which is to control importation, not political activity or expression, requires identification of the importer. There is no unqualified right to anonymous importation of products from hostile nations. There has been here no showing that "the purpose of the recordation is to embarrass the recipient of materials or to chill the exercise of [the] right to receive them." *Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs, Region II, supra*, 459 F. 2d at 683. Where, as here, there is no governmental purpose to chill the First Amendment rights of the importers of such merchandise, the government may properly require the importer to identify himself.

c. Petitioner's claim (Pet. 12-13) that the licensing procedure imposes upon the applicant an unconstitutional burden of proving that the publications are bona fide gifts or otherwise importable is without foundation in fact. The license application (Treasury Form TFAC-4) simply requests a declaration whether the applicant has paid, or intends to pay, for the article. Petitioner, who has not completed such an application, has made no showing that a proper declaration as to the publications here in question would not be accepted at face value. See *Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs, Region II, supra*, 459 F. 2d at 683.[4]

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[4]Although a similar declaration, standing alone, was not accepted in *American Documentary Films, Inc.* v. *Secretary of the Treasury, supra*, the merchandise there, because of its greater monetary value, was subject to the suspicion, aggravated by other facts in that case, that it had been imported for commercial purposes.

2. Petitioner further contends (Pet. 14-17) that the regulatory scheme is arbitrary and overbroad, and that the delegation of authority to the Secretary thereunder is impermissibly vague. This contention is without substance.

Petitioner's allegation of arbitrariness is based on nothing more than the regulatory exemption for publications approved for importation by the Library of Congress or the National Science Foundation. That exemption is not arbitrary; it serves the purpose, also served by the licensing procedures, of permitting importation when there is evidence that some important public benefit would accrue therefrom.

Nor is the regulatory scheme unduly broad merely because it covers the importation of publications having little commercial value. Congress could properly determine that any program designed to prohibit or restrict the flow of United States currency into hostile nations must be comprehensive to achieve the desired result. The statute thus sweeps no more broadly than is necessary to achieve the Congressional intent. Compare *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512-514.

Nor does Section 5(b) of the Trading with the Enemy Act constitute a standardless delegation of legislative authority to the executive. The powers conferred by that provision are clearly stated and the general congressional policy—restriction of the flow of United States currency to hostile nations—in whose service those powers are to be exercised, is well understood. See *United States* v. *Von Clemm*, 136 F. 2d 968 (C.A. 2), certiorari denied, 320 U.S. 769; *Teague* v. *Regional Commissioner of Customs, Region II, supra*, 404 F. 2d at 445; *Sardino* v. *Federal Reserve Bank of New*

York, 361 F. 2d 106, 110 (C.A. 2), certiorari denied, 385 U.S. 898. Moreover, in matters of foreign policy Congress may properly delegate to the executive broader discretion than in domestic matters. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109-110; *Zemel* v. *Rusk*, 381 U.S. 1, 17. See also *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.